IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 1, 2004 Session

# RELIANCE INSURANCE COMPANY v. EDWARD MACKEY, M.D.

**Appeal from the Circuit Court for Davidson County**
**No. 03C-2360 Thomas W. Brothers, Judge**

---

**No. M2003-03106-COA-R3-CV - Filed November 18, 2004**

---

Workers' compensation insurance carrier filed a subrogation action against a physician who allegedly committed malpractice while treating an injured worker. The action was filed almost three years after the cause of action accrued. The physician moved to dismiss the action as time barred. The workers' compensation carrier insisted the action was timely filed, claiming it was afforded two extensions on the statute of limitations, one of which was a six-month extension pursuant to Tenn. Code Ann. § 50-6-112(d)(2).[1] The trial court held that the insurance carrier was not entitled to the six month extension and the action was time barred. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Branch H. Henard, III, Nashville, Tennessee, and Stephen R. Harris, Patricia Proctor, and Michael C. Kochkodin, Philadelphia, Pennsylvania, for the appellant, Reliance Insurance Company.

Noel F. Stahl and Jeffrey Zager, Nashville, Tennessee, for the appellee, Edward Mackey, M.D.

## OPINION

Reliance Insurance Company provided workers' compensation benefits for Marty Kratz when he suffered a work-related injury on March 22, 2000. Following the injury, Kratz was referred to

---

[1] Two statutory extensions are at play here. Pursuant to Tenn. Code Ann. § 50-6-112(d)(2), if the injured worker fails to bring an action within one year, the worker's cause of action is assigned to the employer and workers' compensation carrier who then have six months to commence the action. The other, which is a two-year extension, is afforded to a carrier that is in liquidation. Tenn. Code Ann. § 56-9-313(b)(1).

Dr. Edward Mackey to repair herniated discs. Dr. Mackey performed surgery on Kratz on August 18, 2000, during which it is alleged that Dr. Mackey lacerated Kratz's aorta.[2] In this subrogation action, Reliance alleges that the laceration to Kratz's aorta caused a substantial loss of blood, which in turn, caused Kratz to suffer a debilitating stroke for which Reliance remitted substantial workers' compensation benefits.[3]

Kratz filed a medical malpractice action against Dr. Mackey on August 17, 2001, only to voluntarily dismiss his action on September 27, 2001.[4] Some two years later, August 15, 2003, Reliance filed this action as the purported assignee of Kratz's third party claim against Dr. Mackey. Thus, Reliance filed this action almost three years after Kratz's cause of action accrued.

Reliance filed this action pursuant to Tenn. Code Ann. § 50-6-112(d)(2), alleging that it is the assignee of Kratz's cause of action against Dr. Mackey. The statute provides that an injured worker has one year within which to institute an action against an alleged third party tortfeasor such as Dr. Mackey. It further provides that if the injured worker fails "to bring such action" within one year, the cause of action shall be assigned to the employer (and the workers' compensation carrier), who then has six months from the assignment to commence such suit. Tenn. Code Ann. § 50-6-112(d)(2). Reliance argues that Kratz's voluntary dismissal of the malpractice action against Dr. Mackey constituted a failure to effectively bring an action which caused an assignment of Kratz's cause of action to Reliance on August 20, 2001, which was the one-year anniversary of the accrual of the action. Reliance contends that it had an additional six months from that date within which to commence its action against Dr. Mackey. Therefore, if Reliance's contention is correct, it had until February 20, 2002, to commence this action.

It was during this six-month period that Reliance was placed in liquidation. That occurred on October 3, 2001.[5] Tenn. Code Ann. § 56-9-313(b)(1) provides that the liquidator has two years to institute an action after an order appointing a liquidator is issued if "the period of limitation fixed by applicable law has not expired at the time of the filing of the petition upon which such order is entered." This action was filed on August 15, 2003, less than two years following the entry of the order of liquidation. Thus, Reliance asserts that this action was timely filed because it was in liquidation during the six-month extension afforded by Tenn. Code Ann. § 50-6-112(d)(2) and this action was filed within the two-year window provided by Tenn. Code Ann. § 56-9-313(b)(1).

---

[2]The laceration of the aorta was discovered two days later when Dr. Mackey performed exploratory surgery due to medical complications Kratz was experiencing. Thus, the alleged malpractice claim accrued on August 20, 2000.

[3]Reliance was seeking to recover workers' compensation benefits paid and/or to be paid. At the time Reliance filed its complaint, it had made workers' compensation payments to Marty Kratz in excess of $500,000.

[4]Kratz never revived nor re-filed his action against Dr. Mackey.

[5]The Commonwealth Court of Pennsylvania declared Reliance to be insolvent and appointed a liquidator on October 3, 2001.

Dr. Mackey's motion to dismiss was based on the argument that Reliance was not the assignee of Kratz's cause of action under Tenn. Code Ann. § 50-6-112(d)(2) and therefore was not afforded the six-month extension. The argument was based on the premise that Tenn. Code Ann. § 50-6-112(d)(2) assigns the injured worker's action only if the worker does not file his or her own action. Dr. Mackey argued that Kratz's timely filed suit against him precluded the assignment under Tenn. Code Ann.§ 50-6-112(d)(2), the subsequent voluntary dismissal notwithstanding.

Both parties agree that the liquidation extension provided by Tenn. Code Ann. § 56-9-313(b)(1) would save the day for Reliance if, but only if, Reliance is afforded the six-month extension under Tenn. Code Ann. § 50-6-112(d)(2). Therefore, the only issue before this court is whether Reliance is entitled to the six-month extension pursuant to Tenn. Code Ann. § 50-6-112(d)(2) as the assignee of Kratz's cause of action.

The issue presented requires statutory interpretation which is a question of law. We review questions of law *de novo,* without a presumption of correctness of the trial court's judgment. *See Nelson v. Wal-Mart Stores, Inc*., 8 S.W.3d 625, 628 (Tenn. 1999); *Owens v. Truckstops of America*, 915 S.W.2d 420, 424 (Tenn. 1996).

The statute to be interpreted is the Workers' Compensation Act (the "Act"). The parties present differing perspectives as to how the Act is to be interpreted. Reliance argues that we are to construe the Act liberally, expansively to provide methods by which the ultimate loss resulting from injuries to workers may be borne by the third party wrongdoer. Dr. Mackey argues that a more literal interpretation of the statute is required.

An excellent summary of our role in interpreting the Act is found in *Wilkins v. Kellogg Co.,* 48 S.W.3d 148, 152 (Tenn. 2001). As our supreme court explains, the role of the courts starts with the premise that:

> "[W]hile the Workers' Compensation Act is to be liberally construed for the employee's benefit, that policy does not authorize the amendment, alteration or extension of its provisions beyond its obvious meaning." *Pollard v. Knox County*, 886 S.W.2d 759, 760 (Tenn. 1994). This premise is simply a specific application of the most basic rule of statutory construction: courts must attempt to give effect to the legislative purpose and intent of a statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it. (citations omitted). In attempting to accomplish this goal, courts must keep in mind that the "legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose." *Bryant v. Genco Stamping & Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn. 2000). "Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in

including or excluding that particular subject." *Id.*; *see also Crowe v. Ferguson*, 814 S.W.2d 721, 723 (Tenn. 1991) ("The Court should assume that the Legislature used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and purpose.").

With this premise in mind, and given the fact that each vocational disability category is distinct and serves a specific compensation goal, *see Ivey*, 3 S.W.3d at 446, Wilkins's argument that the trial court correctly calculated her benefits is not persuasive. The trial court based the award on Wilkins's pre-injury average weekly wage, but that concept is conspicuously absent from the temporary partial disability provision of the statute, which refers only to "wage." In a case very similar to the one before us, we have previously held that this conspicuous absence – the appearance of "average weekly wage" in one part of the statute but not another – was dispositive. In *McCracken v. Rhyne*, the employee sought benefits for a permanent partial disability at a time when such benefits were based on the "difference between the wage of the workman at the time of the injury and the wage he is able to earn in his partially disabled condition. . . ." 196 Tenn. 72, 73, 264 S.W.2d 226, 227 (1953). The trial court found that the phrase "wage of the worker at the time of the injury" was synonymous with average weekly wage, and awarded benefits based on that rationale. We reversed, concluding that "the legislature intended to say exactly what it did say" and that a court does not have the authority "to substitute words of its own, and having a different meaning, in lieu of the words which it appears the legislature intended to use." *Id.* 196 Tenn. at 78-79, 264 S.W.2d at 229.

*Wilkins,* 48 S.W.3d at 152.-153.

Reliance places great emphasis on *Plough, Inc. v. Premier Pneumatics, Inc.*, 660 S.W.2d 495 (Tenn. Ct. App. 1983) wherein this court interpreted the statute at issue. The defendants in *Plough* argued that an employer may only sue third parties when the injured employee has failed to sue *any* third parties within one year of the injury. The defendants further argued that once an injured employee sued a third party, any third party, the employer's right to sue additional third parties was pre-empted. The court characterized the defendants' argument as having "the characteristic of a mirage: it disappears upon close examination. It is based upon an altogether strained and narrow reading of the statute." 660 S.W.2d at 498. As the court explained:

The express language of the statute does not support their argument, and we do not believe that defendants-appellees' proposed construction of the statute is an accurate representation of the legislature's intent. Indeed, the statute was passed to *inter alia* facilitate an employer's recovery against tortious third parties when the injured employee has failed to bring an action against such tortious third parties.

Defendants-appellees also assert: "The legislature could easily have provided for this situation by adding to the statute language that allows the employer or insurer

> to bring a suit against any person not sued by the employee." This, of course, is what the legislature did. The irony of this argument is that the defendant's proposed construction of the statute is the only one that requires words not used by the legislature to be added to the statute. The statute simply says: "[Any injured employee] may pursue his . . . remedy by a proper action in a court of competent jurisdiction against such other *person* [legally liable for injuries to the employee]." Tenn. Code Ann. § 50-914 (1977) (emphasis added). The Legislature employed the singular form of "person" in referring to a tortious third party knowing that one or multiple suits could be filed by the employee against alleged tortfeasors. We would strain indeed if we construed the Act to mean that the filing of one suit against one tortfeasor would bar the employer from his rights to sue others under the statute.

*Plough*, 660 S.W.2d at 499.

Reliance argues that a voluntary dismissal by the injured worker is synonymous with the injured worker having failed to "bring" an action. If Reliance is correct, a voluntary dismissal would have the same legal effect as an expungement in a criminal case, which vitiates the fact that the criminal charges were ever filed.[6] We, however, find Reliance's argument to be without merit. A voluntary dismissal remains of record as does the complaint it dismisses. The dismissal does not vitiate the fact that the action was commenced. Indeed, the complaint remains of record, though dismissed, unlike criminal charges that have been expunged.

The rule of statutory construction to which all others must yield is that the intention of the legislature must prevail. *Plough*, 660 S.W.2d at 498; *City of Humboldt v. Morris*, 579 S.W.2d 860, 863 (Tenn. Ct. App. 1978). Legislative intent is to be ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire statute, without a forced construction. *Plough*, 660 S.W.2d at 498-9; *Worrall v. Kroger Company*, 545 S.W.2d 736, 738 (Tenn.1977). To hold that the voluntary dismissal of a civil action equates to the action never having been filed requires a strained reading of the statute, which is inappropriate. *Plough*, 660 S.W.2d at 498. Here, the express language of the statute – that the injured worker failed to "bring" an action – is unambiguous. As the saying goes, it speaks for itself and the rules of statutory interpretation compel us to decline an invitation to construe a statute that is unambiguous.

As the statute expressly provides, once an injured worker – such as Kratz – files an action against the third party, the action has been "brought" or filed against the named defendant(s). The voluntary dismissal of the action does not vitiate that fact. The condition precedent to the assignment of the action from the injured worker, Kratz, to Reliance would be the fact that Kratz failed "to bring such action" against Dr. Mackey. Tenn. Code Ann. § 50-6-112(d)(2). Here Kratz

---

[6] The effect of expunging the records of a criminal charge is to restore the person to the position he or she occupied prior to the arrest or charge. *State v. Sims*, 746 S.W.2d 191, 199 (Tenn. 1988). Thus, persons whose records have been expunged may properly decline to reveal or acknowledge the existence of the charge. *Pizzillo v. Pizzillo*, 884 S.W.2d 749, 754 (Tenn Ct. App. 1994).

did not fail to "bring" an action against Dr. Mackey. To the contrary, Kratz timely filed a malpractice action against Dr. Mackey. Therefore, the timely filing of the action by Kratz against Dr. Mackey precluded the assignment of Kratz's claim against Dr. Mackey to Reliance, the voluntary dismissal notwithstanding. Accordingly, Reliance is not the assignee of Kratz's claim against Dr. Mackey and it is not afforded the six-month extension on the statute of limitations under Tenn. Code Ann. § 50-6-112(d)(2). Thus, this action is time barred.

Costs of appeal are assessed against Reliance Insurance Company.

_____

FRANK G. CLEMENT, JR., JUDGE